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No. 10-855

In the Supreme Court of the United States

MILTON WUZAEL MATHIS, PETITIONER

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

LAURA GRANT TURBIN
Assistant Attorney General
Postconviction Litigation
Division

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@oag.state.tx.us
(512) 936-1700

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to resolve whether a second or successive habeas petition can rely on a "new rule of constitutional law . . . that was previously unavailable," 28 U.S.C. § 2244(b)(2)(A), if the "new rule" predates the applicant's initial federal habeas petition.

2. Whether this Court should grant certiorari to resolve Mathis's fact-bound equitable-tolling claim under 28 U.S.C. § 2244(d)(1).

3. Whether this Court should grant certiorari to decide whether 28 U.S.C. § 2244(b) contravenes the Suspension Clause.

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STATEMENT

On the morning of December 15, 1998, Milton Mathis shot and killed Travis Brown in a room that Brown had rented in Chris Lentsch's house. After dispatching Brown, Mathis left Brown's room, gun in hand, and ordered Lentsch, along with Daniel Hibbard, Esmerelda Lester, and Lester's 15-year old daughter Melanie Almaguer, into another room. Mathis walked up to Almaguer and shot her between the eyes, leaving her paralyzed from the neck down. Then he shot and killed Hibbard. Lester and Lentsch survived only because Mathis's gun ran out of bullets. After he finished with the shootings, Mathis ransacked Lentsch's house, set fire to it, and fled the scene. While Mathis was on the lam, he instructed both his girlfriend and his stepfather to provide false statements regarding his whereabouts on the night before the murders.

At trial, Mathis took the witness stand and denied that he was in Lentsch's house on the morning of the shooting. After the defense requested a recess, Mathis resumed his testimony, admitted that he had lied in his earlier statements, and confessed to shooting all three victims. He claimed that he shot Brown in self-defense, and shot Hibbard and Almaguer because he "panicked" after shooting Brown. The jury was unmoved; it convicted Mathis of capital murder and sentenced him to death.

Although Mathis's trial pre-dated this Court's decision in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), his lawyers nevertheless arranged for a pre-trial I.Q. test. Mathis scored well above the threshold levels for mental retardation, with a full scale I.Q. of 79, a verbal I.Q. of 77, and a performance I.Q. of 85. See

Mathis v. *Dretke*, 124 F. App'x 865, 880–881 (5th Cir. 2005). Because of these test results, Mathis's trial lawyers declined to present or develop evidence of mental retardation at the sentencing phase of his trial. Instead, they focused on other mitigating circumstances and argued that Mathis's drug use impaired his reasoning capacities.

Mathis's direct appeals became final on May 14, 2002, and the Texas Court of Criminal Appeals denied Mathis's first state habeas petition on April 3, 2002. On June 20, 2002, however, this Court issued its ruling in *Atkins*, and Mathis's post-conviction lawyers decided to pursue an *Atkins* claim, in addition to the other claims that Mathis had already exhausted on direct appeal and in his initial state habeas application. But rather than promptly exhausting the *Atkins* claim by filing a second state habeas application, Mathis took no action until April 3, 2003, when he filed a habeas petition in federal district court, limited to the exhausted claims that Mathis had already presented to the state courts. Mathis did not even attempt to exhaust the *Atkins* issue in state court until June 20, 2003, when he filed a second state habeas application asserting an *Atkins* claim.

Because Mathis dawdled in exhausting his *Atkins* claim, he was unable to include it in the federal habeas petition that he filed on April 3, 2003. See *Rose* v. *Lundy*, 455 U.S. 509, 510 (1982) (requiring federal habeas courts to dismiss "mixed petitions" that contain both exhausted and unexhausted claims). But Mathis chose to plow ahead with his federal habeas petition, including only the exhausted (non-*Atkins*) claims that he had raised in the earlier

state-court proceedings. Then Mathis waited until the one-year anniversary of *Atkins*, when he finally filed a state habeas application presenting the *Atkins* claim. Had Mathis waited even one day beyond this date to file that state habeas application, the one-year limitations period of 28 U.S.C. § 2244(d)(1)(C) would have expired on his *Atkins* claim, precluding Mathis from ever presenting it to a federal habeas court.

By waiting until the last possible day to exhaust his *Atkins* claim in state-court proceedings, Mathis has spawned two obstacles to his current efforts to obtain federal habeas relief. First, because Mathis chose to litigate his first federal habeas petition before exhausting his *Atkins* claim, he cannot present his *Atkins* claim in a second or successive federal habeas petition without first surmounting 28 U.S.C. § 2244(b)(2):

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > **(ii)** the facts underlying the claim, if proven and viewed in light of the

> evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Mathis cannot possibly satisfy section 2244(b)(2)(B), given that he confessed in open court to the shootings. So he pins his hopes on section 2244(b)(2)(A), arguing that *Atkins* was "previously unavailable" when he filed his first federal habeas petition on April 3, 2003, even though that petition postdated this Court's *Atkins* ruling by more than nine months.

As a second obstacle, Mathis allowed every day in 28 U.S.C. § 2244(d)(1)(C)'s limitations period to run before attempting to exhaust his *Atkins* claim in state court. This dilatory and foolish decision left Mathis with no time to launch a federal collateral attack once the state courts disposed of his state habeas application. See 28 U.S.C. § 2244(d)(2) (tolling the federal habeas statute's limitations period only while properly filed applications for state post-conviction review are "pending"); *Lawrence* v. *Florida*, 549 U.S. 327 (2007) (withholding equitable tolling where a federal habeas applicant waited 364 days before commencing his state post-conviction proceedings, and missed the one-year limitations period of 28 U.S.C. § 2244(d)(1) when he waited another 113 days after the state courts rejected his state post-conviction claims before filing his federal habeas petition). So while Mathis eventually exhausted his *Atkins* claim in state court, his procrastinating tactics cost him any chance of

complying with AEDPA's one-year limitations period by the time he arrived in federal court.

Choices have consequences. This is as true for Mathis's litigation decisions as it is for his actions on the morning of December 15, 1998. By waiting until the last possible day to bring his *Atkins* claim in state court, Mathis finds himself unable to bring a timely *Atkins* claim in federal habeas court. And because Mathis chose to file his federal habeas petition without first exhausting his *Atkins* claim, he is now unable to satisfy section 2244(b)'s stringent requirements for second or successive habeas applications. His certiorari petition fails to present any issues worthy of this Court's review, and the petition should be denied.

Although the legal issues in this case are straightforward, the procedural history is not. To assist this Court, we have included in the appendix to our brief a timeline showing the relevant dates of the parallel federal- and state-court proceedings. See App., *infra*. We also think it appropriate to discuss Mathis's post-conviction litigation tactics in some detail, to dispel his claims of "extreme diligence" and provide some context for the so-called "Hobson's choice" of which he complains. Pet. i, 19.

A. Mathis's First State Habeas Proceeding

Texas law requires capital defendants to pursue state habeas remedies even while direct appeals are still pending.[1] This prompted Mathis to file his first

[1] See Tex. Code Crim. Proc. art. 11.071(4)(a) ("An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel

state habeas application on February 6, 2001, long before his conviction became final on direct appeal. Mathis failed to raise or develop any mental-retardation claims in this state habeas proceeding, but he also filed his application more than a year before this Court's ruling in *Atkins*. The Texas Court of Criminal Appeals rejected Mathis's initial state habeas application on April 3, 2002, before the *Atkins* ruling (June 20, 2002), and before Mathis's conviction became final on direct appeal (May 14, 2002).

B. Mathis's First Federal Habeas Proceeding

Because Mathis's conviction became final on May 14, 2002, the Antiterrorism and Effective Death Penalty Act gave him until May 14, 2003, to file his federal habeas petition. See 28 U.S.C. § 2244(d)(1)(A). And the *Atkins* ruling of June 20, 2002, triggered a fresh one-year window for any mental-retardation claim that Mathis might have wanted to present to a federal habeas court. But federal law requires prisoners to exhaust their claims in state court before presenting them in federal habeas petitions, and Mathis had not presented a mental-retardation claim in his first (pre-*Atkins*) state habeas application. This situation did not present any serious obstacle to federal-court review; Mathis needed only to return to state court to exhaust his *Atkins* claim before filing his first federal habeas petition. Section 2244(d)(2) would have tolled the one-year limitations period while any "properly filed" state habeas petition was "pending." And the

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under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.").

Texas "two-forum rule," which requires state courts to dismiss habeas petitions when an applicant simultaneously challenges his conviction in federal habeas court, would be inapplicable if Mathis had filed his second state habeas application before launching his federal collateral attack.

Yet Mathis spurned this approach. Rather than exhaust his *Atkins* claim *before* filing a federal habeas petition, Mathis filed a habeas petition in federal district court presenting only his exhausted, non-*Atkins* claims on April 3, 2003. Then Mathis waited until the one-year anniversary of *Atkins* before finally attempting to exhaust his mental-retardation claim in state court. In his certiorari petition, Mathis claims that he chose this file-first-exhaust-later strategy because he feared that the Fifth Circuit might have withheld statutory tolling from his non-*Atkins* claims if he returned to state court to exhaust only his *Atkins* claim before filing his federal habeas petition. Pet. 27. But there is no legal basis for this concern. Section 2244(d)(2) compels courts to toll AEDPA's one-year limitations period while any "properly filed application for State post-conviction or other collateral review *with respect to the pertinent judgment* or claim is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). The state habeas applications urging the *Atkins* claim are undoubtedly "with respect to the pertinent judgment" that Mathis challenges in his federal habeas petitions. It is unheard of for a federal habeas court to limit section 2244(d)(2)'s tolling provision to the specific claims advanced in the state post-conviction proceedings. Mathis's situation is hardly unique; many federal habeas petitioners have already exhausted their trial-error claims during the

direct-appeal process, and they use state post-conviction procedures to exhaust only their *Strickland* claims or other claims that they were unable to raise on direct appeal. Every federal habeas court of which we are aware extends statutory tolling to *all* of the petitioner's claims during the time that a state habeas petition is "pending," even when the state habeas application does not include all of the claims that the petitioner will present in his federal habeas petition. See, *e.g.*, *Cowherd* v. *Million*, 380 F.3d 909, 912–914 (6th Cir. 2004) (en banc); *Ford* v. *Moore*, 296 F.3d 1035, 1038 (11th Cir. 2002) (per curiam); *Sweger* v. *Chesney*, 294 F.3d 506, 520 (3d Cir. 2002); *Carter* v. *Litscher*, 275 F.3d 663, 665 (7th Cir. 2001); *Tillema* v. *Long*, 253 F.3d 494, 502 (9th Cir. 2001). Mathis does not cite any case, from any jurisdiction, that withholds statutory tolling in this type of situation.

Mathis also says that he feared that his second state habeas application might fail to qualify as a "properly filed application" under section 2244(d)(2) if the Texas courts wound up rejecting his *Atkins* claim on procedural grounds. But a unanimous Supreme Court had made clear in 2000 that state post-conviction applications will be deemed "properly filed" even when a state court rejects them as procedurally barred. See *Artuz* v. *Bennett*, 531 U.S. 4 (2000). Only applications that contravene a state-law "condition to filing," such as timeliness requirements, fall outside the statutory tolling provision of section 2244(d)(2),[2] and Mathis's second state habeas petition falls comfortably within *Artuz*'s

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[2] See *Artuz*, 531 U.S. at 10–11; *Pace* v. *DiGuglielmo*, 544 U.S. 408, 417 (2005).

safe harbor. Mathis acknowledges *Artuz* in his certiorari petition, but never explains how a federal habeas court bound by *Artuz* could exclude a timely but unsuccessful state habeas application from AEDPA's statutory tolling provisions.

In exchange for avoiding the remote possibility of the Fifth Circuit misapplying either section 2244(d)(2)'s statutory tolling provisions or this Court's ruling in *Artuz*, Mathis chose to accept the certainty that his *Atkins* claim would run headlong into section 2244(b)(2) and section 2244(d)(1) when he raised it in a second or successive habeas application. Perhaps Mathis chose this route because he wanted a prompt federal-court resolution of his non-*Atkins* claims, hoping that this might speed his exoneration. Or perhaps he wanted to exhaust his *Atkins* claim at the last possible minute and then raise it in second or successive federal habeas petitions, thinking that this approach might delay his execution date longer than the conventional approach of exhausting all claims before filing in federal court. Whatever the reason, Mathis did not confront a "Hobson's choice" in deciding whether to exhaust his *Atkins* claim before filing his first federal habeas petition; he faced only a choice among options that each presented advantages and drawbacks.[3]

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[3] Mathis is misusing the phrase "Hobson's choice" by equating it with a decision that involves only undesirable choices. A Hobson's choice arises when one is given the option of taking the one thing offered or nothing at all; that does not describe the situation that Mathis faced when he chose to file his federal habeas petition before exhausting his *Atkins* claim. See, *e.g.*, Bryan A. Garner, *A Dictionary of Modern Legal Usage* 404 (2d ed. 1995) ("Tradition has it that Thomas Hobson (1549–1631), a hostler in Cambridge, England, always gave his customers only

Most choices will present some potential downside no matter what option is chosen; that does not enable those who later regret their decisions to escape the consequences by incanting the "Hobson's choice" cliché.

C. Mathis's Second State Habeas Proceeding

Mathis finally filed his second state habeas application on June 20, 2003—the last day of AEPDA's one-year limitation period. Mathis does not explain why he waited until the last possible day that he could file without forfeiting his *Atkins* claim in the federal habeas proceedings. Although he notes that it took "many months" to gather evidence for his mental-retardation claim, and that Texas courts were slow to develop substantive criteria for *Atkins* litigation, Pet. 11–12, this does not explain why he filed on June 20, 2003, rather than June 1, 2003. This Court can safely reject Mathis's insistence that he chose "the least reckless" alternative by litigating his *Atkins* claim in this way. Pet. 13. Filing his state habeas application on June 1, 2003, would have been far less reckless; that would have preserved at least *some* time for Mathis to launch a federal collateral proceeding once the state courts disposed of his *Atkins* claim. See *Lawrence* v. *Florida*, 549 U.S. 327 (2007).

Mathis's second state habeas application immediately encountered problems under the Texas two-forum rule, which prohibits state courts from considering habeas applications while the prisoner is

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one choice among his horses: whichever one was closest to the door."). Mathis could have filed a second state habeas application before going to federal court; he chose not to do so.

challenging the conviction in federal habeas proceedings. See *Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972). While Mathis's second state habeas application was pending, the Texas Court of Criminal Appeals softened the two-forum rule by allowing prisoners to pursue state habeas remedies if a federal court stayed their federal habeas proceedings. See *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004). Mathis responded to *Soffar* by asking the federal district court to stay his habeas proceeding so he could exhaust his *Atkins* claim and avoid the two-forum rule. But the district court, having already entered a final judgment against Mathis on his federal habeas petition, denied Mathis's request for abatement, forcing the state habeas court to dismiss Mathis's application without prejudice on March 3, 2004. Mathis complains loudly that the federal district court misinterpreted *Soffar*'s holding when it noted (mistakenly) that the state habeas court would allow Mathis to litigate his *Atkins* claim while pursuing appeals in his federal habeas proceedings. See Pet. 15; Pet. App. 228a. But even if the federal district court had realized that its decision would compel the state habeas court to dismiss Mathis's *Atkins* claim under the two-forum rule, there is no reason to think that this would have caused the district court to change its mind and abate the federal habeas proceedings. The district court had already denied Mathis's habeas petition and entered a final judgment before Mathis moved for abatement, and its order denying the motion seemed unreceptive to Mathis's efforts to

raise a new *Atkins* claim in federal court at this late stage of his initial federal habeas proceeding.[4]

D. Mathis's Third State Habeas Proceeding

The two-forum rule kept Mathis from filing another state habeas application until he finished the appeals process in his first federal habeas petition. That occurred on March 11, 2005, when the Fifth Circuit denied Mathis's request for a certificate of appealability, freeing Mathis to renew his *Atkins* claim in state habeas proceedings. On April 15, 2005, five days before his scheduled execution, Mathis filed his third state habeas application with the Texas Court of Criminal Appeals. The Court of Criminal Appeals stayed Mathis's execution and remanded the case to the trial court to consider the *Atkins* claim. After a five-day evidentiary hearing, the trial court concluded that Mathis was not mentally retarded, and the Court of Criminal Appeals adopted the trial court's findings and conclusions. *Ex parte Mathis*, No. 50,772-03 (Tex. Crim. App. Sept. 20, 2006). Each of these courts found that Mathis's 1991 IQ test revealed a full-scale IQ of 79, and Mathis's crimes "required forethought, planning, and complex execution of purpose." Pet. App. 107a–108a, 116a.

E. Mathis's Second Federal Habeas Proceeding

Nine days after the Texas Court of Criminal Appeals rejected Mathis's *Atkins* claim, Mathis asked the Fifth Circuit for authorization to file a

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[4] See Pet. App. 228a ("For the first time in these proceedings Mathis argues that, pursuant to recent Supreme Court authority, his alleged mental retardation exempts him from execution.").

second or successive petition. See 28 U.S.C. § 2244(b)(3). A three-judge panel granted the motion, and Mathis filed another habeas application with the federal district court, renewing the *Atkins* claim that the state habeas courts had rejected. The district court, however, dismissed Mathis's *Atkins* claim under both 28 U.S.C. §§ 2244(b) and 2244(d)(1). It held that Mathis could not satisfy 28 U.S.C. § 2244(b)(2)(A) because the *Atkins* ruling was not "previously unavailable" when Mathis filed his initial federal habeas petition. In the alternative, the district court held that Mathis's *Atkins* claim was time-barred, and denied equitable tolling because Mathis had "waited until the last day of his one-year period to file an *Atkins* claim" in state court. Pet. App. 61a. The Fifth Circuit affirmed each of these holdings, and now Mathis wants this Court to review the Fifth Circuit's resolution of both the section 2244(b) and section 2244(d)(1) issues.

REASONS FOR DENYING THE WRIT

I. Mathis's 28 U.S.C. § 2244(b)(2)(A) Argument is Splitless and Presents Serious Vehicle Problems

A. The courts of appeals agree that Mathis's *Atkins* claim fails to satisfy 28 U.S.C. § 2244(b)(2)(A)

Mathis wants this Court to resolve whether his *Atkins* claim was "previously unavailable" at the time he filed his initial federal habeas petition. The Fifth Circuit answered "no" after concluding that Mathis "offers no cogent argument to excuse" his failure to raise his *Atkins* claim in the first federal habeas petition. See Pet. App. 19a. Mathis contends

that the Fourth and Seventh Circuits also would have answered "no"; he notes only that those courts would have taken a more direct route to that conclusion by excluding *any* Supreme Court decision announced before the previous habeas petition from the "previously unavailable" category. Yet all of these courts of appeals agree on the proper *outcome* of this case. This Court should not grant a writ of certiorari when the petitioner describes only a disagreement over the reasoning process that the court of appeals might employ when they all would end up rejecting Mathis's section 2244(b)(2)(A) argument.

What's more, the Fifth Circuit's opinion took care to *distinguish*, rather than repudiate, the opinions in *In re Williams*, 364 F.3d 235 (4th Cir. 2004), and *Bennett* v. *United States*, 119 F.3d 470 (7th Cir. 1997). Each of those opinions holds that second or successive habeas petitions cannot satisfy 28 U.S.C. § 2244(b)(2)(A) if they rely on Supreme Court rulings that predate the earlier habeas petition. Although the Fifth Circuit "decline[d] to adopt" this straightforward approach to section 2244(b)(2)(A), it also noted that neither *Williams* nor *Bennett* "addressed *Atkins* claims"; nor did they address "the particular circumstances raised in this case." *See* Pet. App. 8a. The Fifth Circuit never expressed any disagreement with the holding or reasoning in *Williams* or *Bennett*, and it went out of its way to avoid conflicts with those decisions by cabining its approach to *Atkins* claims.

Mathis's efforts to manufacture a circuit split cannot overcome the fact that all three courts of appeals would conclude that his *Atkins* claim fails to

satisfy 28 U.S.C. § 2244(b)(2)(A). The Fifth Circuit merely took a different path to the same destination, perhaps out of special solicitude for *Atkins* claimants. That does not present a conflict that requires this Court's resolution.

B. The statute-of-limitations problem in this case makes it an inappropriate vehicle for this Court to resolve the 28 U.S.C. § 2244(b)(2)(A) issue

Even if this Court were inclined to grant certiorari to resolve the meaning of "previously available" in 28 U.S.C. § 2244(b)(2)(A), this case presents the wrong vehicle. The Fifth Circuit dismissed Mathis's *Atkins* claim not only because it did not satisfy 28 U.S.C. § 2244(b), but also because it was untimely.[3] Although Mathis tries to characterize himself as a victim of circumstances in his plea for "equitable tolling," he cannot escape the fact that he contributed to his timeliness problems by waiting until the very last day of AEDPA's limitations period before filing his *Atkins* claim in state court. This Court should not reach out to decide the section 2244(b)(2)(A) issue when the Fifth Circuit's judgment rests securely on these statute-of-limitations grounds. It would be more prudent to await a petition unencumbered by these timeliness problems or, at the very least, to await a petitioner with a more compelling claim for equitable tolling.

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[3] See Pet. App. 26a–27a ("Even if the petition met the standard [under 28 U.S.C. § 2244(b)(2)(A)], we hold that the petition was time-barred under AEDPA's statute of limitations, and the district court did not abuse its discretion when it denied equitable tolling.").

II. Mathis's Equitable-Tolling Claim is Splitless and Seeks Factbound Error-Correction

Mathis acknowledges that the *Atkins* claim in his second federal habeas petition falls outside the one-year limitations period in 28 U.S.C. § 2244(d)(1), leaving him to seek "equitable tolling" in this case. The Fifth Circuit rejected Mathis's equitable-tolling claim after applying the standards from this Court's recent decision in *Holland* v. *Florida*, 130 S. Ct. 2549 (2010), which allow a habeas petitioner to obtain equitable tolling only if he shows: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in the way and prevented timely filing." *Id.* at 2562 (citations and internal quotation marks omitted). The Fifth Circuit thought that Mathis had pursued his rights diligently, even though the district court had held otherwise, but concluded that Mathis failed to demonstrate that "extraordinary circumstances stood in his way" because he could have brought his *Atkins* claim in state court earlier than June 20, 2003.

Mathis says that the Fifth Circuit's ruling is "in direct conflict with" the Eighth Circuit's decision to grant equitable tolling in *White* v. *Dingle*, 616 F.3d 844 (8th Cir. 2010). But one need only read the opinion in *White* (rather than Mathis's carefully redacted excerpts) to see that Mathis is concocting the circuit split that he claims in his petition.

The habeas petitioner in *White* had filed a "mixed" petition, which included both exhausted and unexhausted claims, eight months before the limitations period expired. A magistrate judge recommended dismissal without prejudice, the

district court accepted that recommendation, and the Eighth Circuit affirmed without remanding. By the time of the court of appeals' decision, the one-year limitations period had run. And because the Eighth Circuit had (mistakenly) failed to remand the case after affirming the district court's dismissal, the petitioner had to file a new habeas petition after the limitations period, rather than proceeding with his initial, timely petition by dismissing the unexhausted claims. The district court dismissed that new habeas petition as untimely, and the Eighth Circuit held that its erroneous failure to remand the prior appeal warranted equitable tolling. Wrote the Court:

> White's current inability to obtain federal review of his exhausted claims is a direct result of our failure to remand his prior appeal with instructions that the district court consider those claims on the merits. Had we done so, the district court could have given White an opportunity to proceed with his exhausted claims rather than having his entire petition dismissed. There is no indication that our failure to remand White's case was anything other than an oversight. Indeed, such a remand would have been fully consistent with the Supreme Court's directive in *Rhines v. Weber* to avoid dismissal without prejudice when it would unreasonably jeopardize a petitioner's access to review of his exhausted claims. We previously endorsed remand under similar circumstances in *Underdahl v. Carlson*, 381 F.3d 740, 744 (8th Cir. 2004), a case in which the petitioner appealed the district court's dismissal of his

> petition for failure to exhaust state remedies. * * * We conclude that our failure to remand White's petition after his first appeal qualifies as an extraordinary circumstance.

White, 616 F.3d at 848. Although the state noted that the habeas petitioner could have avoided the statute-of-limitations problem by foregoing an appeal from the magistrate judge's recommendation to dismiss his mixed petition, the Eighth Circuit refused to withhold equitable tolling on that ground. It did not think the petitioner should be "required to decide between accepting the magistrate judge's initial ruling on the exhaustion question or running the risk that, if that ruling was later affirmed, he would forfeit any further federal review." *Id.* at 849.

The Eighth Circuit in *White* merely extended equitable tolling to a prisoner who had been victimized by the Court's erroneous refusal to remand his earlier appeal, forcing him to file a new habeas petition after the limitations period had run. That holding has nothing to say for the situation in this case, where a petitioner misses the limitations period because of his own decisions to wait until the last possible day to begin exhausting his *Atkins* claim, and to file his first federal habeas petition before exhausting the *Atkins* claim. Although Mathis tries to blame the federal district court for his predicament by criticizing its refusal to grant his motion to abate his first federal habeas proceedings, the district court was under no legal obligation to abate Mathis's initial federal habeas proceedings. Even if the district court had understood that *Soffar* would have compelled the state courts to dismiss Mathis's state habeas petition, the district court was

fully within its rights to deny the motion for abatement that Mathis filed after the court had entered final judgment.

III. The Suspension Clause Issues Are Splitless and Mathis Forfeited Them by Omitting Them From His Fifth Circuit Brief

Mathis does not even argue that his Suspension Clause claim presents a circuit split. The opinions he cites from the lower courts involve little more than offhand ruminations on the issue. See Pet. 37–39. None of them contains developed analysis, let alone a holding, that any provision of 28 U.S.C. § 2244(b) contradicts the Suspension Clause. This Court should not grant a writ of certiorari on this question until the courts of appeals produce divergent holdings.

Worse, Mathis never raised his constitutional objection to 28 U.S.C. § 2244(b) in his Fifth Circuit brief, and never gave the lower courts an opportunity to address the constitutional issues that he now asks this Court to resolve. For his attorneys to raise this issue for the first time in a certiorari petition, when it could and should have been presented earlier in the proceedings, is an abusive (though all-too-common) tactic employed by capital litigants, and it should not be tolerated by this Court. Cf. *Sawyer* v. *Whitley*, 505 U.S. 333, 341 n.7 (1992). Mathis has forfeited these constitutional attacks on section 2244(b) and this Court should not consider them.

IV. Mathis's *Atkins* Claim Received Full and Fair Consideration in the State Habeas Proceedings

If this were a non-capital case, we would be content to note the absence of a circuit split and vehicle problems and leave it at that. But because Mathis is facing the death penalty, we think it appropriate to note that his *Atkins* claim received full and fair consideration in state habeas proceedings that were subject to this Court's certiorari review. The state habeas court held a five-day evidentiary hearing and issued a 28-page opinion explaining its findings of fact and conclusions of law. It noted that Mathis's pre-trial IQ scores comfortably exceeded the threshold levels for mental retardation, and that Mathis failed to establish that mental retardation occurred prior to age 18, as Texas law requires for *Atkins* claimants. See Pet. App. 117a. See also *Mathis* v. *Dretke*, 124 F. App'x 865, 881 (5th Cir. 2005) ("It is a mystery how Mathis could have scored 10-20 points higher on his I.Q. test before trial as compared to after his conviction."). The state habeas court also noted that Mathis had sufficient mental capacity to plan the crimes and arrange for his stepfather and girlfriend to provide phony alibis to the investigators. Mathis has had his day in court on his *Atkins* claim, and this Court can safely deny this certiorari petition without fearing that a mentally retarded inmate will face execution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

LAURA GRANT TURBIN
Assistant Attorney General
Postconviction Litigation
Division

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@oag.state.tx.us
(512) 936-1700

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APPENDIX

MATHIS LITIGATION TIMELINE FOR MENTAL RETARDATION CLAIM		
STATE	**DATE**	**FEDERAL**
Capital murder conviction	September 9, 1999	
Appellant's brief filed	**March 28, 2000**	
First state application filed	**February 6, 2001**	
Direct appeal affirmed	February 6, 2001	
First state app. denied	April 3, 2002	
	April 18, 2002	**Motion for appointment of counsel filed**
Judgment final	May 14, 2002	
	June 20, 2002	***Atkins v. Virginia***
	April 3, 2003	**First federal petition filed**
Second state application filed; raised *Atkins* claim (only)	**June 20, 2003**	
	February 2, 2004	First federal petition denied;

STATE	DATE	FEDERAL
		COA denied; final judgment entered
In re Soffar[6]	February 11, 2004	
	February 17, 2004	**Motion for New Trial & for Abatement filed**
Second state application dismissed: pending federal proceeding	March 3, 2004	
	March 9, 2004	MNT & Abatement re *Atkins* in state court denied
	March 19, 2004	**Motion for Reconsideration filed**
	April 6, 2004	Mot. for Recon. denied

[6] 143 S.W.3d 804 (Tex. Crim. App. 2004). Mathis's second state habeas application was dismissed under the *Powers* or "two-forum" doctrine, which held that the Court of Criminal Appeals would dismiss any writ application if the prisoner had a parallel application arising from the same conviction pending in federal court. *Ex parte Powers*, 487 S.W.2d 101 (Tex. Crim. App. 1972). The *Powers* court stated that it would decline to consider such a case as long as a federal court retained jurisdiction, even if the federal court had abated the case.

STATE	DATE	FEDERAL
	April 8, 2004	Notice of Appeal filed
	August 12, 2004	Motion for COA & brief filed
Trial court sets execution date of April 20, 2005	January 6, 2005	
	February 2, 2005	Motion to Stay Execution filed
	March 7, 2005	Amended Motion to Stay Exec & Motion to Stay re *Atkins* in state court filed
	March 11, 2005	COA & Stay motions denied
	March 25, 2005	Petition for Rehearing filed
	April 6, 2005	Motion to Stay Execution filed
	April 8, 2005	Petition for Rehearing denied
	April 12, 2005	Motion to Stay Exec. denied

STATE	DATE	FEDERAL
Third state application filed	April 15, 2005	
Motion for stay of execution filed	April 18, 2005	Petition for certiorari filed
Stay granted; case remanded	April 19, 2005	
	June 23, 2005	Petition for cert denied
Evidentiary hearing	September 12-15, 2005	
Third state application denied	September 20, 2006	
	September 29, 2006	Motion for Authorization to File Successive Petition filed
	April 2, 2007	Motion for authorization granted
	April 4, 2007	Second federal application filed